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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D.C., a Minor.

MICHAEL H.,

Petitioner and Respondent,

v.

S.C.,

Objector and Appellant.

D074762

(Super. Ct. No. A62660)

APPEAL from a judgment of the Superior Court of San Diego County, Edlene McKenzie, Commissioner. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Objector and Appellant.

S.C. appeals a judgment declaring his son, D.C., free from his custody and control under Family Code section 7822.<sup>1</sup> He contends the court prejudicially erred in appointing counsel first to assist and then to represent the stepfather in the private stepparent adoption proceeding. S.C. further contends the court's finding that it was in his son's best interest to be adopted by his stepfather is not supported by substantial evidence. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

D.C. is the son of Mary H. and S.C. Mary and S.C. ended their relationship a month after D.C.'s birth in 2006. Mary met Michael H. in December 2015 and married him in July 2017.

In March 2018, Michael filed a petition to adopt D.C. An initial hearing on the matter was held on June 8, 2018. The court informed Michael he first needed to file a petition for freedom from parental custody and control and told him he could obtain the form from the court or the court's website. The court appointed counsel for S.C. and minor's counsel for D.C. Upon inquiry by the court pursuant to the Indian Child Welfare Act (ICWA), title 25 United States Code section 1901 et seq. and Welfare and Institutions Code section 224 et seq., S.C. said he had American Indian heritage on his father's side. Citing the complexity of ICWA notice requirements, the court appointed counsel to assist the petitioner with ICWA notice and filing a petition under section 7822.

After the hearing, D.C. approached his father and gave him a hug.

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<sup>1</sup> Further unspecified statutory references are to the Family Code.

On June 22, the court reviewed the petition for freedom from custody and control and confirmed the appointment of counsel for the father, minor, and stepfather. S.C.'s counsel informed the court that S.C. had completed the ICWA forms. The court instructed him to file the ICWA notices.<sup>2</sup>

A hearing on the section 7822 petition was held on September 13, 2018. S.C. appeared by telephone. Mary testified she met S.C. in 2003. D.C. was born in Florida in 2006. S.C. was at the hospital when D.C. was born. He maintained contact and paid child support for two years but did not make any support payments after 2008. When she spoke to S.C. about support he said he was in between jobs, not working, or working and getting paid under the table and could not afford to help with D.C.'s care.

Mary said when she was deployed from November 2011 to June 2012, her niece Jasmine cared for D.C. at Mary's home in Florida. In approximately June 2012, Mary was away for nine weeks. D.C. went to Mississippi to stay with S.C. but ended up living with his paternal grandmother.

S.C. attended D.C.'s eighth birthday party in 2014 and gave him a gift, but other than that did not send cards, letters or gifts to D.C. Mary and D.C. moved to New Orleans in 2012. The first year they were in Louisiana, D.C. visited S.C. at least one weekend a month. She and S.C. would meet halfway but S.C. was often late and Mary did not feel safe waiting for him. When she told S.C. he had to come to New Orleans to

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<sup>2</sup> At a later hearing, the court determined proper notice was provided and ICWA did not apply.

see D.C., the visits stopped. Mary's sister cared for D.C. when Mary was deployed in 2015.

Mary moved to Virginia in 2016. S.C. came to take care of D.C. when Mary was called away for a week. After three months in Virginia, they moved to California in June 2016. S.C. did not see D.C. from approximately March 2016 to May 2018, when he saw him in court.

On cross-examination, Mary acknowledged after they moved to California, S.C. asked if D.C. could visit him in Mississippi. Mary said D.C. did not want to go. She believed it was appropriate to allow a 10-year-old to make that decision.

Mary met Michael in 2015 and married him in July 2017. Michael provided for D.C. financially, emotionally, and physically. She believed it was in D.C.'s best interest to be adopted by his stepfather. They were very close. Michael was involved with D.C.'s sports and schoolwork.

Jasmine G., Mary's niece, testified she cared for D.C. for approximately a year and a half in 2010 to 2011 during Mary's deployment. S.C. did not attempt to contact D.C. during that time and did not send any financial support.

S.C. testified he was at the hospital when D.C. was born and stayed at Mary's house for a week after they were discharged from the hospital. S.C. visited when he could and maintained contact with Mary to check on D.C. because D.C. was not able to talk at that time. S.C. estimated he visited D.C. approximately every three months when Mary lived in Florida. After D.C. was old enough to talk, S.C. would telephone on his

birthday and holiday, but Mary would not answer the phone. At other times, she would say "oh, he's busy" or "he'll have to call you back," but there was never a time S.C. could talk freely to his son. Once D.C. had his own cell phone, they would video message. They also communicated through Facebook, text messages and telephone calls.

S.C. said he talked to Jasmine on a regular basis while she was caring for D.C. She was only 18 or 19 years old at the time. He also talked with his son. In approximately 2011 to 2012, D.C. came to live with him. Mary's sister was giving D.C. unprescribed ADHD medication. Mary was hesitant but allowed D.C. to live with him. This was the fall of the 2011-2012 school term. D.C. finished the school term and stayed with him for the summer for a total of seven or eight months. They lived with his mother, D.C.'s grandmother. D.C. did not have any behavior problems and started making good grades.

S.C. testified his wages were garnished for child support. He was never paid under the table. He worked at CVS and Best Buy. Mary suspended child support when D.C. was living with him. S.C. was not able to pay child support from 2013 to 2016. He was unemployed for two years, then had back surgery, and then was unemployed for approximately a year and a half. S.C. never intended to abandon his son. He loved him.

Tina Jako, a social worker for the San Diego County Health and Human Services Agency, wrote the custody and control report, which was admitted in evidence. S.C. did not respond to her requests for an interview and her report and recommendations were based only on Mary's interview. S.C. had not visited D.C. since 2016, did not provide

any financial support after 2008, and had only token telephone contact with D.C. after they moved to California in 2016.

Jako believed S.C. had abandoned his son and recommended the court free D.C. from his father's custody and control. During the two years since D.C. moved to California, S.C. did not maintain a parental relationship with his son. It was in D.C.'s best interest to be adopted by his stepfather. D.C. viewed his stepfather as his father and wanted to be adopted by him. He said, "My dad [stepfather] is there for me and cares about me." He enjoyed watching football with him and proudly said his stepfather was his football coach. D.C. was aware of his father, who was an important person in his life, and referred to him as "dad." D.C. said, "I barely see him and it has always been like this."

The court found that Mary's testimony was clear, specific, and credible. The court did not find S.C. to be as credible. He made a number of inconsistent statements. The court also credited Jasmine's testimony S.C. did not contact or support D.C. during the year and a half he was in her care. After 2016, when S.C. visited with D.C. for four days in Virginia, there was no further contact until June 2018. The court said it was remarkable that a father who did not want his parental rights terminated did not meet with the social worker, who had contacted him on several occasions.

The court found by clear and convincing evidence D.C. came within section 7822 and it was in his best interest to be adopted by his stepfather. His stepfather was a father figure to D.C. and took responsibility for him. D.C. was proud that his stepfather was

coaching his football team. The court gave much weight to D.C.'s wishes and declared him free from the custody and control of his father.

## DISCUSSION

### A

#### *Arguments on Appeal*

S.C. contends the court prejudicially erred in appointing counsel to first assist and then represent the stepfather in the private stepparent adoption proceeding. S.C. argues the court's finding that it was in his son's best interest to be adopted by his stepfather is not supported by substantial evidence. He does not challenge the finding he left his son in the care or custody of the other parent for a year with the intent to abandon his child.

### B

#### *Relevant Legal Principles*

Section 7822 allows the court to declare a child free from the custody and control of the child's parent if a parent has left his or her child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child. (§ 7822, subd. (a)(3).) The failure to provide support or the failure to communicate is presumptive evidence of the intent to abandon. If the parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent. (§ 7822, subd. (b).) In a proceeding under section 7822, the court is required to "consider the wishes of the child, bearing in mind the age of the

child, and . . . act in the best interest of the child." (§ 7890.) A declaration of freedom from parental custody and control terminates all parental rights and responsibilities to the child. (§ 7803.)

## C

### *S.C. Has Forfeited the Issue on Appeal the Court Erred in Appointing Counsel for the Stepfather; Nevertheless, Any Error Was Not Prejudicial*

S.C. contends the court erred in appointing counsel for the stepfather, initially to assist him with filing a section 7822 petition and ICWA notice, and later to represent him at trial. S.C. points out that a natural parent has a statutory right to appointed counsel to safeguard the constitutionally-protected relationship with his or her child. (§ 7862.) He argues there is no statutory right to court-appointed counsel for a person whose fundamental parental rights are not at risk of termination. S.C. also complains the court unfairly assigned the task of proving ICWA notice to him instead of the petitioner.

Assuming, without deciding, S.C. has standing to raise the issue of appointment of counsel for another party to the proceeding,<sup>3</sup> and assuming, without deciding, the court lacked the authority to appoint counsel for a party whose parental rights were not at risk of infringement or termination, we nevertheless conclude that S.C. has forfeited the issue

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<sup>3</sup> A parent cannot raise issues on appeal from a proceeding to terminate his parental rights that do not affect his own rights. (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703.) "Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (*In re K.C.* (2011) 52 Cal.4th 231, 236.) Because no respondent's brief was filed and the issue of standing has not been briefed on appeal, we do not discuss it here.



by failing to object to the appointment of counsel for stepfather during the trial court proceedings.

A party forfeits the right to claim error as ground for reversal on appeal when he fails to raise the objection in the trial court. This "is intended to prevent a party from standing by silently until the conclusion of the proceedings." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222 (*Dakota H.*)). S.C. did not bring to the court's attention his claim that the court did not have the authority to appoint counsel for the stepfather to assist him in filing a petition, preparing ICWA notice, and to represent him at trial. Similarly, S.C. did not object when the court asked him to file the ICWA notices, stating "I can [file them] this morning." A party may not assert a theory on appeal he failed to raise in the trial court. (*Dakota H., supra*, at p. 222.)

Even were the issue not forfeited, we would conclude that S.C. was not prejudiced by the appointment of counsel for stepfather. S.C. argues the appointment of counsel gave the stepfather the resources of the state to help terminate the parent/child relationship. We are not persuaded by S.C.'s argument. S.C.'s right to counsel was not infringed in any way. He received the benefits of a court-appointed attorney and the right to present evidence, cross-examine the witnesses, and mount a defense. The stepfather was entitled to be represented by counsel in this proceeding, if he so elected. Whether his counsel was privately retained, pro bono, or court-appointed<sup>4</sup> does not affect S.C.'s own

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<sup>4</sup> Section 7863 states private counsel appointed in a freedom from custody and control proceeding shall receive a reasonable sum for compensation and expenses, the

rights. Finally, the social worker's report alone contains substantial evidence to support the finding that S.C. abandoned his son within the meaning of section 7822, a finding S.C. does not challenge on appeal. We conclude that S.C. was not prejudiced by the appointment of counsel for stepfather.

## D

### *Substantial Evidence Supports the Finding Adoption Is in D.C.'s Best Interest*

S.C. contends the court's finding stepparent adoption is in D.C.'s best interest is not supported by substantial evidence. For such a claim, we examine the record to determine whether there is substantial evidence to support the trial court's conclusions. (*In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010.) We have no power to pass on the credibility of witnesses, resolve conflicts in the evidence or determine the weight of the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) It is the appellant's burden on review to show that the evidence is insufficient to support the trial court's findings. (*In re Adoption of Allison C.*, *supra*, at p. 1011.)

In a proceeding under section 7822, the court is required to "consider the wishes of the child, bearing in mind the age of the child, and . . . act in the best interest of the

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amount of which is determined by the court and paid by the real parties in interest, other than the child, in proportions the court deems just. If the court finds that any of the real parties in interest are unable to afford counsel, then the amount shall be paid out of the general fund of the county. (§ 7863.) Absent an indication to the contrary, we are required to presume a court was aware of, and followed, the applicable law. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 447.) Here, there is no indication to show the court determined that any real party in interest was unable to afford counsel, therefore the argument a private party was given the benefit of state resources is not supported by the appellate record.

child." (§ 7890.) The court afforded "much weight" to D.C.'s wishes to be adopted by his stepfather. In a private interview with the social worker, D.C. said he agreed with the adoption. He said, "Adoption is when my biological dad is taken out of the picture and my stepdad is taking care of my well-being." He referred to his stepfather as "dad," saying he "is there for me and he cares about me." D.C. was aware of his father and referred to him as "dad." D.C. said, "I barely see him and it has always been like this." He realized his father was an important person in his life but did not feel like he knew him. The social worker testified that in her opinion, it was in D.C.'s best interests to be adopted by his stepfather. We also consider that D.C. is 12 years old and his consent is required to finalize the adoption. (§ 8602.)

While the record leaves no doubt D.C. viewed his father as an important person in his life, it also shows that D.C. was aware of his father's absence. In view of his close relationship with his stepfather, who had provided for D.C.'s emotional, developmental and financial well-being for several years, and his attenuated relationship with his own father, who did not contribute to his support and had not visited him for several years, the court did not err when it concluded that stepparent adoption was in D.C.'s best interest.

DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.